FILED
JUN 12 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 1804

HENRY GIORDANO,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JACOB P. LEFKOWITZ
Attorney for Petitioner
150 Broadway
New York 38, N. Y.

32 CASE PRESS INC., 421 Hudson St., N.Y.—Okeg.6-4540

INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provisions and Statutes Involved	5
Statement of the Case	8
Reasons for Granting the Writ	21
Conclusion	37
Appendix A—Judgment Sought to Be Reviewed (No Opinion Rendered)	38
Appendix B—Point II of Government's Brief in Court of Appeals	40

Authorities Cited

Cases

Hyde v. United States, 225 U.S. 347	25
Lopez v. United States, 373 U.S. 427	36
Maher v. Isthmian Steamship Company, 253 F. 2d 414 (C.A. 2 1958)	26
Manley v. United States, 283 F. 2d 211 (C.A. 6, 1956)	26, 27, 32
On Lee v. United States, 343 U.S. 747	36
United States v. Castro, 228 F. 2d 807 (C.A. 2, 1956)	32
United States v. De Groat, 30 Fed. 764 (E.D. Mich., 1887)	27

Statutes

	PAGE
18 U.S.C. §2071	2, 6, 27
18 U.S.C. §4208(a)(2)	8
26 U.S.C. §7214(a)(2)	2, 5
26 U.S.C. §7214(a)(9)	2, 3, 5
28 U.S.C. §1254(1)	2
R.S. §5403	27
United States Constitution:	
Fourth Amendment	5, 36
Fifth Amendment	2, 5, 36
Sixth Amendment	2, 5, 36

Miscellaneous

53 Am. Jur. 714 (Trial, §1033)	26

IN THE

Supreme Court of the United States

October Term, 1963

No.

HENRY GIORDANO,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Henry Giordano, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on May 14, 1964.

Opinions Below

The District Court rendered no opinion. The Court of Appeals affirmed the judgment of conviction without rendering any opinion.*

---

* We are informed by the office of the Clerk of the Court of Appeals that recently that Court has been following a policy of rendering a reduced number of opinions both in affirmances and reversals.

Jurisdiction

The judgment of the Court of Appeals was entered on May 14, 1964 (Appendix, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

Petitioner, a Revenue Officer of the United States Internal Revenue Service, was convicted of an unlawful attempt to collect money from a taxpayer (26 U.S.C. §7214(a)(9)), and of willful mutilation of a taxpayer's affidavit (18 U.S.C. §2071). The same jury acquitted him of *demanding* (26 U.S.C. §7214(a)(2)) the same alleged bribe which it convicted him of *attempting to collect*. The questions presented are:

1. Did the verdict and judgment of conviction under Count Four (unauthorized attempt to collect money from a taxpayer) work a denial of due process of law under the Fifth Amendment and of the right of trial by an impartial jury under the Sixth Amendment in view of the indicatedly improper compromise character of the verdict, the Jury having acquitted petitioner of the charge of "demanding" (Count Three) the very same alleged bribe which it convicted him of "attempting to collect" (Count Four), the trial proofs as a whole being such as to make it readily understandable that the Jury could have had authentic doubts as to the defendant's guilt, and the Trial Court's instructions not having assisted the Jury to avoid such an incongruous verdict?

2. Are the verdict and judgment of conviction under Count Two (mutilation of a taxpayer's affidavit) likewise

vitiated and rendered void by derivation or infection from the circumstances referred to in question No. 1 above, in view of the fact that the alleged happenings involved in Count Two formed an integral part of the overall alleged happenings to which the situation mentioned in question No. 1 above relates; and in view of the posture of the proofs as to the charges under Count Two, those proofs being such as to make it quite understandable that the Jury could have had authentic doubts as to the defendant's guilt, and the Trial Court's instructions to the Jury having been inadequate to assist them in properly resolving such doubts?

3. Can the indicated compromise-generated inconsistency mentioned in Question No. 1, *supra*, be explained away by saying that subdivision "(2)" of 26 U.S.C. §7214(a) (charged in Count Three—under which petitioner was acquitted) relates to unauthorized "demand" of money "for the performance of any duty" and that subdivision "(9)" of that statute (Count Four—under which petitioner was convicted) relates to unauthorized "attempt to collect" money "for the compromise, adjustment, or settlement" of tax complaints or violations? Can this ostensible distinction be supported on the present record in view of the language of Count Three of the indictment, which omitted any mention of money demanded "for the performance of any duty" and merely charged an unauthorized demand of money in a tax matter, or in view of the trial proofs, which were utterly devoid of any suggestion that the case was viewed by the Government as involving any issue of money demanded "for the performance of any duty"—both the indictment and the proofs under Counts Three and Four being pitched exclusively and undifferentiatedly on the idea of unauthorized demand of or attempt to collect money

from a taxpayer in a single undifferentiated situation? And does subdivision "(2)" of the statute in any event support the reading that the *only* offense it contemplates is in connection with money demanded *for the performance of a duty*, or does it contemplate the *distinct* and *separate* offenses of (1) unauthorized *demand* of money and (2) illegal *receipt* of a "fee, compensation or reward * * * for the performance of any duty"?

4. Was it error to submit to the Jury the question of petitioner's guilt under Count Two (mutilation of the taxpayer' affidavit), and was the defendant's guilt under this Count proved beyond a reasonable doubt?

5 Was petitioner denied a fair trial by the Trial Court's charge to the Jury on presumption of innocence and reasonable doubt? Were these instructions so confused, so perfunctory and so excessively qualified by cautionary remarks against acquittal, as to deprive the defendant of any real chance for acquittal in this case where the prosecutive cards were already so stacked against him anyhow? Were these instructions "plain error" (raised in the Court of Appeals)?

6. Was petitioner denied a fair trial, his Fifth Amendment rights of due process of law and freedom from self-incrimination, and his rights of freedom from unreasonable search and seizure under the Fourth Amendment by the admission in evidence, over defense objection, of a miniphone wire recording; by the use which the Government made at the trial, especially in cross examining petitioner and in the Prosecutor's summation, of the purported stenographic transcript of that recording; and by the Trial Court's rulings in regard to these matters?

Constitutional Provisions and Statutes Involved*

The case involves the Fourth (unreasonable search and seizure), Fifth (due process and self-incrimination) and Sixth (fair and impartial jury) Amendments of the United States Constitution, and the statutes which we quote after our next paragraph below.

We include, in our quotation (below) of the pertinent statutes, the second sub-division of 26 U.S.C. §7214 (a), which was the basis of Count Three of the indictment; we include this sub-division (2), which petitioner was acquitted by the Jury of violating, for its bearing on our discussion *infra* concerning the issues presented by the Jury's disparate verdicts on Counts Three and Four.

26 U.S.C. §7214(a), sub-divisions (2) and (9) (charged in Counts Three and Four, respectively), read in pertinent part as follows:

> "§ 7214. Offenses by officers and employees of the United States
>
> (a) Unlawful acts of revenue officers or agents—Any officer or employee of the United States acting in connection with any revenue law of the United States—"
>
> • • • • •
>
> "(2) who knowingly demands other or greater sums than are authorized by law, or receives any fee, compensation, or reward, except as by law prescribed, for the performance of any duty; or"
>
> • • • • •

* For convenience we include under this heading the text of the pertinent Counts of the indictment, as to whose language we are asking the Court to observe certain important differences from and resemblances to the respective statutory provisions.

"(9) who demands, or accepts, or attempts to collect, directly or indirectly as payment or gift, or otherwise, any sum of money or other thing of value for the compromise, adjustment, or settlement of any charge or complaint for any violation or alleged violation of law, except as expressly authorized by law so to do;

shall be dismissed from office or discharged from employment and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both. * * *"

18 U.S.C. §2071 (charged in Count 2) reads as follows:

"§ 2071. Concealment, removal, or mutilation generally

(a) Whoever willfully and unlawfully conceals, removes, mutilates, obliterates, or destroys, or attempts to do so, or, with intent to do so takes and carries away any record, proceeding, map, book, paper, document, or other thing, filed or deposited with any clerk or officer of any court of the United States, or in any public office, or with any judicial or public officer of the United States, shall be fined not more than $2,000 or imprisoned not more than three years, or both.

(b) Whoever, having the custody of any such record, proceeding, map, book, document, paper, or other thing, willfully and unlawfully conceals, removes, mutilates, obliterates, falsifies, or destroys the same, shall be fined not more than $2,000 or imprisoned not more than three years, or both; and shall forfeit his office and be disqualified from holding any office under the United States. June 25, 1948, c. 645, 62 Stat. 795."

The two conviction counts of the indictment read as follows* (6a, 7a**):

"COUNT TWO

On or about the 16th day of August 1962, at and near Atlantic and Flatbush Avenues, Brooklyn, within the Eastern District of New York, the defendant HENRY GIORDANO, then a Revenue Officer of the Internal Revenue Service, United States Treasury Department, wilfully and unlawfully mutilated an affidavit of one Martha Thompson deposited with the Office of the said Internal Revenue Service, 245 West Houston Street, New York, New York. (Title 18 United States Code, Section 2071.)"

"COUNT FOUR

On or about the 16th day of August 1962, at and near Atlantic and Flatbush Avenues, Brooklyn, within the Eastern District of New York, the defendant HENRY GIORDANO, then a Revenue Officer of the Internal Revenue Service, United States Treasury Department, acting for and on behalf of the United States in an official capacity, unlawfully and without authority attempted to collect the sum of Six Thousand Dollars ($6,000.00) from one Marion W. Lohse for the compromise, adjustment and settlement of a complaint for an alleged violation of the Internal Revenue Laws of the United States. (Title 26 United States Code, Section 7214(a) (9).)"

Because this Petition, as noted, presents issues in connection with the Jury's acquittal of petitioner under Count Three while convicting him under Count Four, we here quote also Count Three of the indictment (6a):

* See our last preceding footnote as to our reasons for quoting from the indictment under this heading of our Petition.

** "— a" refers to the "Appellants' Appendix" printed for the Court of Appeals; nine extra copies are filed herewith.

"COUNT THREE

On or about the 16th day of August 1962, at and near Atlantic and Flatbush Avenues, Brooklyn, within the Eastern District of New York, the defendant HENRY GIORDANO, then a Revenue Officer of the Internal Revenue Service, United States Treasury Department, while acting for and on behalf of the United States in his official capacity and in connection with the Internal Revenue Laws of the United States, knowingly demanded from one Marion W. Lohse the sum of Six Thousand Dollars ($6,000.00), which amount was not authorized by law. (Title 26 United States Code, Section 7214(a) (2).)"

Statement of the Case

The petitioner, Henry Giordano, a Federal Government employee for nearly thirty years, has never before been in trouble with the law. He took the stand in his own defense at this trial, denying the charges (*infra*). He introduced character testimony (171a-174a). He is married and is the father of six children; he was forty-seven years old at the time of this trial (109a).

The indictment, trial and conviction were had in the District Court of the United States for the Eastern District of New York. Petitioner was sentenced to 18 months on each of the two conviction counts pursuant to 18 U.S.C. 4208(a)(2), to run concurrently (216a). He is free on bail. The trial proofs will be summarized:

In March, 1962, a Mrs. Martha Thompson (a Government witness in this trial) received a letter from the Internal Revenue, signed by Giordano,* advising her that there was

* It is undisputed that the Thompson tax matter had been referred to Giordano by his superior officers in the ordinary and proper course of official business (93a-94a).

no record of her having filed an income tax return for the year 1960, and directing her to appear for an interview (10a). In April, 1962, Mrs. Thompson met Giordano at the Internal Revenue Office at 245 Houston Street, New York City (11a). Mrs. Thompson testified that after she had disclosed to Giordano that for many years she had jointly signed (as spouse) the income tax return of a sea captain named Marion B. Lohse, Giordano asked her for a $5,000 bribe to drop the case (11a-18a). Mrs. Thompson also testified that Giordano did not press this alleged bribe request, did not mention it to her again after the one time when he allegedly brought it up, and that ultimately he helped her straighten out her tax situation by preparing returns for her on which no tax was due (19a-23a).* Mrs. Thompson also testified to facts showing that Captain Lohse for about thirty years had given substantial financial support to her and her children; and had in effect acted as the head of the household listing Mrs. Thompson and her children as tax dependents, Mrs. Thompson being separated from her husband and Captain Lohse being unmarried (12a-13a, 24a-28a). She testified that Giordano had her sign an affidavit averring facts as to Captain Lohse's part in having had her sign joint tax returns with him (19a-20a, 22a), and that Giordano had given her a copy of this affidavit at her request (23a). In her last interview with Giordano, he advised her that later he would deal with Captain Lohse (who was out of the country at the time) (23a).

* The Government does not contend that Giordano made any further alleged bribe-seeking efforts against Mrs. Thompson, and the indictment contains no charges of any bribe requests addressed to Mrs. Thompson. Her trial testimony was offered and admitted to show alleged background as to the alleged intent of Giordano in connection with the indictment charges as to the alleged attempt to get a bribe from Captain Lohse (*infra*).

Very shortly after Mrs. Thompson had concluded her dealings with Giordano she was able to get word to Captain Lohse that a serious income tax problem had arisen (32a, 50a-51a, 60a; see also 28a). Captain Lohse testified* that he communicated with Giordano near the end of July, 1962, that Giordano confronted him with a potential tax liability, including assessments for fraud and interest, of about $54,000, that Lohse himself had a strong feeling of worry and guilt about his tax-fraud history, and that in a discussion on the street outside of Giordano's office on August 1, 1962 Giordano asked him for a payment of $10,000 as a bribe to settle the case; that thereafter, on August 8, 1962 Lohse drew $10,000 in cash out of his bank; that upon talking to his lawyers and Internal Revenue detectives on August 13, 1962 he decided to see Giordano again, evidently for the purpose of trapping the latter in the act of taking money illegally; that on instructions from the Internal Revenue detectives Lohse made an appointment with Giordano for August 16; that Lohse and Giordano met in a restaurant in Brooklyn on August 16, Lohse having been equipped beforehand by the Internal Revenue detectives with a miniphone device; that Lohse was carrying $5,000 with him; and that while they were riding around in Giordano's car Giordano asked for the money, there was some haggling over the amount. Giordano then became apprehensive when he saw taxicabs following them, Giordano then tore his own attesting signature off the Martha Thompson affidavit,** and Giordano then accused Lohse of trying to bribe him and ordered Lohse to appear the next day at Giordano's office

* Lohse's testimony, forming the heart of the Government's case, is printed with no significant omissions at 31a-79a.

** Additional details as to this mutilation of the affidavit are noted *infra*.

to be formally charged with such bribery attempt. Lohse testified that no money was paid to Giordano, the interview of August 16 in Giordano's automobile having terminated when Giordano made the above mentioned accusation.*

Other witnesses called by the Government testified to facts concerning Giordano's official duties (O'Brien—93a-102a) and the miniphone recording (Moran, 80a et seq.), topics which we take up in distinct connections *infra*.

The theory of the defense, developed through the testimony of defendant Giordano himself and through cross examination of Mrs. Thompson and Captain Lohse, was as follows: (1) In connection with the phase relating to Mrs. Thompson, Giordano had assisted her to straighten out her tax situation, as she had herself testified, but he had made no attempt to get her to pay him a bribe (109a-119a, 148a-149a). As regards this entire phase relating to Mrs. Thompson in the instant trial, it was her word against Giordano's. (As mentioned, the Thompson phase was in this case solely for its materiality on the issue of Giordano's alleged intent in regard to Captain Lohse.) (2) As to the happenings in connection with Captain Lohse himself, Giordano's testimony is in virtually complete accord with Lohse's own (and with the miniphone wire recording—see *infra*) except on the crucial issue of whether Giordano was trying to extort a bribe from Lohse or whether Lohse was trying to bribe Giordano who in turn was trying to perfect the evidence of such bribery effort on the part of Lohse with a view to having the latter arrested. It is beyond the confines of this petition to set forth in detail the lengthy pertinent testi

* Lohse said that just as he was getting out of Giordano's car Giordano asked him to open his coat, which was for the purpose (as Giordano himself testified—*infra*) of checking whether Lohse was wearing a recording device (42a).

mony of Giordano, and we therefore (as in the case of Lolise's testimony) printed in our Appendix below without significant omission what we believe to be the entire relevant testimony of Giordano including the lengthy and rigorous cross examination (109a-170a).

The Government, over defense objection, was permitted to play for the jury (92a), twice, the miniphone wire recording, contents of which were also brought to the Jury's attention (over defense objection) in the cross-examination of Giordano at 151a, 157a-169a. It is our contention that, passing all questions as to the admissibility of this wire recording,* everything contained in the recording could have been found by a jury to be consistent with Giordano's claim that he was engaged, as an honest Government official, in trying to clinch a case of bribe-offering against a corrupt taxpayer who was in bad income tax trouble. The wire recording is Government's Exhibit 12 (91a); the substance of the alleged contents of the recording (*viz* an alleged stenographic transcript thereof)** appears at 151a, 157a-169a.

We conceded in the Court below that the Jury could rationally have reached a verdict of guilty under Count Four if the latter Count had stood alone in the indictment without the companion Count Three. Count Four was the "attempt to collect" charge. Count Three was the "demand" charge. We do not concede that the jury verdict of conviction under Count Four was rational in the final

* These questions of admissibility, and the compoundedly serious question of the use which the Court permitted the Government to make of a purported stenographic transcript of this recording, present issues which we take up *infra*.

** See preceding footnote.

analysis, owing to the incongruous factor (see further discussion *infra*) of the concommitant jury verdict of acquittal on Count Three (the "demand" count).*

If, as we contend, this exceedingly strange combination of Jury verdicts betrays on the Jury's part some deep feeling of disturbance about the sufficiency of the Government's proofs of guilt in regard to the bribery aspects of the case viewed overall, then a certiorari issue of worth is presented as to the legality of the verdict of conviction under Count Four. The "demand" for $6,000 from Captain Lohse which Giordano is accused of having made under Count Three involves exactly the same incident (including exactitude of identity as to time and place, which we shall more fully note in a moment) as does the "attempt to collect" said $6,000 from Lohse under Count Four. That these two counts look solely to the alleged happening of the evening of August 16, 1962 when Lohse and Giordano met in Brooklyn and rode around in the latter's automobile is shown on the face of the indictment, which refers in both Counts Three and Four to that incident "on or about" the latter date "at and near Atlantic and Flatbush Avenues, Brooklyn" (6a).

In other words the indictment charges under Count Three in this case do not involve any "demand" which is separate in time or place or in any other way from the "attempt to collect" which is alleged in Count Four.

Putting it simply, the alleged "demand" under Count Three *is* the "attempt to collect" under Count Four.

---

* Nor do we concede that there was a case for submission to the jury, or for conviction under the rule of reasonable doubt, under Count Two (the mutilation of document count—*infra*).

This absolute identity as between the two offenses charged respectively in these two Counts could not be reasoned away by any suggestion that the "demand" was made by one person and the "attempt to collect" by another. Under the Government's proofts, under the entire proofs in this case, there is no "demand" "on or about the 16th day of August, 1962 at and near Atlantic and Flatbush Avenues, Brooklyn" (Count Three) by anyone except Giordano; and there is no "attempt to collect" at that time and place by anyone except Giordano. This conclusion is not affected by the statements attributed to Giordano to the effect that he had some unnamed confederate (40a, 161a-162a).

This supposed confederate appears in the record only through the alleged miniphone-recorded voice of Giordano at the above mentioned time and place in Giordano's automobile during his alleged conversation with Lohse, where Giordano is supposed to have been referring to such an anonymous confederate as one who was to share in the fruits of the alleged bribe—Lohse saying that this was part of Giordano's extortion effort, and Giordano saying that it was part of his masquerade in an effort to get clinching evidence of a bribe offer by Lohse.

In light of all this, we urged below that the Jury either had to convict Giordano on both Counts Three and Four, or it had to acquit him on both Counts; that it is impossible to see in logic or in law how a jury verdict makes sense which acquits Giordano of "demanding" the very bribe which the Jury convicts him of "attempting to collect"; and that the only possible explanation of this mystifying Jury verdict under Counts Three and Four is that the Jurors were not unanimously convinced of Giordano's guilt under either of

these two Counts of the indictment and that the verdict must have been the product of a compromise among the Jurors. We also urged below that this explanation becomes the more likely and convincing when the following significant details of the trial testimony are noted—as items which must have given pause to the Jury:

(1) Both Mrs. Thompson and Captain Lohse admitted that they were very worried about the income tax frauds which they had committed, a fact which obviously lends credence to the defense theory that the Thompson-Lohse couple were inclined to attempt bribery* (17a, 23a, 61a-62a). (2) Mrs. Thompson never reported the alleged bribe demand of Giordano to anyone connected with the Internal Revenue until August 20, 1962 (30a), which was four days after the critical meeting of her friend Captain Lohse with Giordano when the latter allegedly tried to collect the bribe while riding around with Lohse in an automobile in Brooklyn. (3) Lohse admitted that he withdrew $10,000 from his bank more than a week before the latter automobile riding session and that he did so with intention to pay a bribe (36a, 61a-62a). (4) In that automobile riding session Lohse was undisputedly the first to bring up (it was not Giordano who did so) the subject of Lohse's having money available with him (63a-65a, 74a-78a). (5) Giordano undisputedly never took any money from either Mrs. Thompson or Lohse (23a, 28a-30a, 74a). (6) The trial proofs raised at the very least

---

* We do not contend that Mrs. Thompson offered a bribe prior to Captain Lohse's entry upon the scene in July-August 1962; we do of course deny that Giordano demanded a bribe from Mrs. Thompson at any time. Our suggestion, is rather, that the Thompson-Lohse testimony at this trial was designed by them, acting jointly, to exculpate Lohse.

a strong issue of factual doubt as to whether Giordano had committed any breach of official regulations or even of prudent official judgment in not having reported the bribe offers which Giordano claimed Lohse had been making for some time prior to August 16, 1962 (132a-135a). (7) The proofs strongly negated the Government's contention that Giordano was going out of the line of his official duties and functions in following up on the tax matter of Captain Lohse after having concluded Mrs. Thompson's tax matter (98a-102a 118a, 120a, 146a). (8) Even taking into account the miniphone wire recording of August 16, 1962, i.e., if we are correct in an earlier suggestion that the recording contains nothing inconsistent with Giordano's claim that it was Lohse who was trying to bribe him and that he was trying to clinch a case of attempted bribery against Lohse (see especially 145a-146a), there was no proof from which the Jury had to feel inclined to infer the guilt of Giordano other than what came from the mouths of Mrs. Thompson and Captain Lohse, both of whom were obviously not disinterested witnesses. (9) The above-mentioned worry and concern of the Thompson-Lohse couple was, in the light of the trial proofs, very well justified indeed, for fraud had been practiced not only on the Internal Revenue Department but also on Captain Lohse's employers in regard to dependency claims, and it was admitted that these frauds had netted sums running into the tens of thousands of dollars for both Mrs. Thompson and Captain Lohse (12a-13a, 16a-17a, 20a, 24a-25a, 34a, 57a).*

---

* Incidentally, Captain Lohse had also fraudulently claimed the additional exemption for persons over the age of 65 (124a).

It is evident, then, that this was not a case of clear-cut guilt of the accused Henry Giordano—who moreover had taken the stand in his own defense and had testified freely and earnestly to his innocence; as noted, he had also introduced character testimony. It is not to be wondered at that the Jury must have felt deep hesitations about its verdict. These hesitations, we contended below, are expressed in the remarkable, indeed incomprehensible compromise verdict which the Jury rendered.

The defense unavailingly moved the Trial Court to set aside the verdict as having been of this compromise character (212a-214a); the Court of Appeals rejected the same contention.

As noted, the Court of Appeals did not write an opinion in affirming the conviction. However, it was evident at the oral argument of the appeal that the Court was persuaded by the following argument of the Government in rejecting our contention of a compromise verdict (Govt's Br. in Ct. App., pp. 5-6):

> "Appellant's further contention that the verdicts with regard to Counts Three and Four are inconsistent, is baseless.
>
> 26 U.S.C. Section 7214(a)(2) and (a)(9) (charged in Counts 3 and 4 respectively), deal with different crimes. (Br. p. 4) Subdivision (2) deals with a demandof a sum of money, fee, compensation or reward not authorized by law, for the performance of any duty by a revenue officer. Subdivision (9) deals with demands, acceptances or attempts to collect payments, gifts or other items of value "for the compromise, adjustments or settlement of any charge or complaint for any violation or alleged violation of

law . . . " Subdivision (2) as is obvious from a plain reading of that section concerns an unauthorized demand of money by a revenue officer to perform his duty. Subdivision (9) deals with a demand, or acceptance or attempt to collect* a bribe by a revenue officer to influence him to compromise, adjust or settle an alleged violation of law. It is payment asked by a revenue officer to forego the performance of his official duties.

It is perfectly consistent for the jury to have acquitted appellant of Subdivision (a)(2) (Count Three), in that he did not demand an unlawful sum of money *to perform his duty* but to find appellant guilty of Subdivision (a)(9) (Count Four), in that for a price, appellant was willing *not to perform his duty*. There was no inconsistency or confusion in the minds of the jury upon the verdicts they rendered." (Italics in original)

The testimony relating to Count Two (alleged mutilation of a taxpayer's affidavit) will now be noted:

Lohse and Giordano, the only witnesses to the alleged mutilation of the Martha Thompson affidavit, testified for all practical purposes identically with each other concerning the circumstances of this alleged "mutilation", except, of course, as to the different motivations of Giordano which might be inferred from their respective accounts of this happening. Lohse and Giordano agreed in testifying that while they were riding in Giordano's automobile on August 16, 1962 Giordano turned over to Lohse the In-

---

"* Only an 'attempt to collect' violation was alleged in Count Four."
[Footnote in original]

ternal Revenue office copy of the Martha Thompson affidavit, that shortly after this (still riding in the car) Giordano asked Lohse to give him back the affidavit*, and that Giordano then tore off the lower left hand corner of the affidavit (58a-59a, 68a *et seq.*, 105a *et seq.*, 116a, 118a, 135a-136a, 141a-142a, 148a-150).

But for the circumstances which we shall mention in a moment, the Jury might rationally have concluded that Giordano thus tore a piece off the affidavit in order to conceal the fact that he had attested Mrs. Thompson's signature on that document.** The circumstances just referred to--which rendered it impossible, we contended in the Courts below, for the Jury rationally to reach the latter conclusion and which indeed made the Government's case under this count of the indictment insufficient for submission to the Jury—were as follows:

(1) It is undisputed that Lohse and Mrs. Thompson had in their possession, to the knowledge of Giordano, a duplicate copy of the affidavit (21a, 58a, 60a). How, then, could there be rationally attributed to Giordano any wilful or ill-intentioned motive of concealment in connection with his tearing of the other copy of the affidavit?

---

* This occurred, according to both Lohse and Giordano, after Giordano made statements indicating that he thought Lohse might be trying to trap him (Giordano); Giordano's explanation of his having made these statements is that it had suddenly occurred to him that the suspectedly bribe-offering taxpayer against whom he was trying to obtain stronger proof might be engaging in exactly the same kind of detection effort against him (Giordano) (140a).

** This was the affidavit which Giordano took from Mrs. Thompson in April 1962 in connection with the settling up of her own tax matter; the affidavit included admissions concerning Lohse's having obtained Mrs. Thompson's signature on the "joint" tax returns.

(2) Giordano's explanation at the trial was that he engaged in this tearing action as part of his detection process against Lohse as a bribe-offeror, i.e., to see how Lohse would react (142a).*

(3) This defense theory of Giordano's true motive in "mutilating" the affidavit was confirmed all but conclusively by the undisputed fact in this trial that Giordano had kept both the main body of the affidavit document and the torn off bit, and that it was the defense itself which introduced these items, reconstituted with scotch tape, as an exhibit in this trial (103a-108a, 118a, 141a-144a, 149a-150a). Why would the defense thus put into evidence the very *corpus delicti* for the proof of Count Two, if Giordano had the motivation attributed to him by the Grand Jury under that count? Why would Giordano have kept the two pieces of the torn affidavit if he had a guilty mind about this? What would have been easier than for Giordano to have disposed of these pieces of paper if he were bent upon concealment?

(4) This last mentioned fact, that the torn affidavit nevertheless remained textually intact (which, again, occurred thanks only to the preservative actions of the defendant), in itself negated, moreover, the very idea of a "mutilation" in point of law, since the document remained, as just said, textually intact. This latter consideration was

* Giordano did not further explain this purpose at the trial, but the strategy of this purpose of his may readily be surmised: Giordano wanted to see whether Lohse, whom by this time Giordano had suddenly begun to suspect of trying to put him (Giordano) in the wrong, would be disappointed at Giordano's removing from the affidavit ostensible evidence of Giordano's own supposed guilt.

unsuccessfully urged upon the Trial Judge by the defense as a ground for dismissing Count Two; the defense likewise unsuccessfully urged the above mentioned point as to the defendant's having himself made available the document at the trial (103a-108a). The same contentions failed also in the Court below, which evidently accepted the Government's argument* (Govt.'s Br. Ct. App., Point II, pp. 7-8).**

Reasons for Granting the Writ

1. The indicatedly compromise character of the jury verdict in this case bespeaks an underlying fatal unfairness in this prosecution, a fundamental unfairness of sufficient gravity to merit this Court's intercession in the interests of the proper administration of Federal criminal justice. At the core of this problem of basic fairness in our case, moreover, is a serious question of interpretation of an important Federal criminal statute which this Court has never decided and which we believe the Court below has wrongly decided.

This is one of those cases—all too increasingly numerous in recent decades—where the essence of the prosecutive strategy seems to be to snare the defendant into a convic-

---

* Under our "Reasons for Granting the Writ," *infra*, we advance the additional points that the conviction under Count Two is vitiated by derivation from the integrally connected compromise-illegality of the conviction under Count Four; and that the Trial Court's instructions to the Jury as to Count Two were prejudicially erroneous. Other portions of the instructions to the Jury as to which we claim error are also noted in our "Reasons," *infra*.

** We print in our Appendix B, hereto, *infra*, this Point II of the Government's brief in the Court below, because the non-rendering of any opinion by the Court below leaves its reasons for decision unascertainable on the record except through the possibilities afforded by such reference to the Government's presentation.

tion by opportunistic technicalities rather than to seek a forthright enforcement of the law. It is not our ambition in this proceeding to overturn the doctrine that Congress may variously proscribe the same act or conduct as constituting more than one crime—albeit the distastefulness of this method of exercise of the Congressional power to define criminal offenses may yet one day turn out to be a matter for renewed judicial concern. What we are urging here is that when the particular indictment in our case, the particular statute in our case, the particular way in which the Government made its prosecutive proof in this case, and the particular way in which the Government later came to theorize its position on the appeal in our case—when all of these circumstances are considered together, then, what we are urging is that the result is so fundamentally unfair as to amount to a denial of due process of law.

What did this indictment charge in Counts Three and Four? Did the indictment charge, in either of those Counts, that petitioner Giordano tried to get a bribe "for the performance of any duty"? Did not the indictment simply charge, in both of those Counts, that Giordano tried to get money illegally and unauthorizedly in a tax matter? And was it not the identical tax matter and the identical effort to get money which formed the charge under both Counts Three and Four, it being undisputed that both of these Counts involved solely the identical two actors at the identical time and place with the identical subject matter? The trial record, moreover, may be searched in vain for the remotest hint that Giordano was being accused of, or was on trial for, seeking a bribe "for the performance for any duty." On the contrary, the whole case, from beginning to end, was a case of alleged effort by Giordano to get a bribe

for *not* performing his duty as a Revenue Officer in the matter of the Thompson-Lohse tax fraud case. Where, anywhere in this indictment or anywhere in this trial, was the defendant apprised by even the faintest suggestion of "apprisal" that he was being accused and tried for seeking a bribe for "the performance of any duty?"

It was not until the case reached the Court of Appeals and the defendant-appellant Giordano in that Court had filed his brief demonstrating in detail the indicatedly compromise character of the verdict, that the Government bethought itself for the first time of the language in subdivision (2) of the statute concerning "performance of any duty."

Even if subdivision (2) of the statute means what the Government says (apparently the Court below accepted the Government's suggested meaning)—which we earnestly dispute (*infra*)—that is, even if the statute in subdivision (2) sets up only one integrated offense of seeking or receiving bribes "for the performance of any duty," what happened in this case of ours is intolerable to due process of law. For, as above said, the defendant was neither charged nor tried under any such statutory theory, but in fact was charged and tried upon an exactly opposite theory, namely, that he sought a bribe for *not* performing his duty. Indeed, upon the Government's theory of a bribe "for the performance of any duty" the defendant could not have been effectually charged or tried at all, because there is literally nothing in the entire picture of this case which could give color to any idea that the defendant tried to get a bribe for *performing* rather than for *not performing* his duty.

As concerns the statute itself, the language of subdivision (2) is at best (from the Government's standpoint) so ambiguous as to fall under the ban of the constitutional rule of voidness on account of vagueness if the Government's reading of this provision is accepted. Subdivision (2) commences with the words, "who knowingly demands other or greater sums than are authorized by law", and it is just this area of statutorily forbidden conduct, and no more than this, which the indictment in Count Three charges. Subdivision (2) continues with the words, "or receives any fee, compensation, or reward, except as by law prescribed, for the performance of any duty"; no part of these latter words, and nothing derivable from these latter words, appears in Count Three of the indictment, or anywhere else in the indictment.

As we suggested earlier in this petition, subdivision (2) is at least susceptible of being read as setting up two distinct offenses, composed respectively of the two portions of subdivision (2) which we have separately quoted in our last preceding paragraph. That subdivision (2) is indeed reasonably susceptible of this reading is convincingly demonstrated by the stark fact that the Government itself, in this very case, evidently so construed the provision—until the afterthought opportunism of the Government's brief writers in the Court of Appeals discerned a neat way of salvaging the conviction in this case. For, again, the indictment in Count Three did not go beyond the first clause of subdivision (2), the trial proof did not go beyond that clause, nothing in the case was ever conceived of by anyone as going beyond that first clause of subdivision (2) (or beyond the cognate language of subdivision (9)), until the

Government faced our compromise-verdict contention in the Court of Appeals.*

The conclusion seems inescapable that, as we suggested at the outset of these "Reasons," the inclusion in the indictment of both Counts Three and Four was done in that over-zealous spirit of prosecutive snaring to which we have referred and which so many statutes nowadays render possible through multifarious definition of what in substance are identical offenses. Perhaps there is no judicial relief against such indictments and such statutes on any basis of *abstract* right of a defendant; but is it fair and is it constitutional to visit upon a defendant *concrete* consequences of the sort which petitioner has here suffered? Is it fair and constitutional to let this kind of "double talk" indictment and "double talk" legislation result in a final and non-reversible conviction even where the jury has manifestly utilized the "double talk" situation to bring in a compromise verdict?

Precisely because the Court below gave such short shrift to our above contentions—not even rendering an opinion and, apparently, resolving unanimously to affirm the conviction in open Court at the argument of appeal—this Court should the more firmly apply its own hand if, as we earnestly contend, our contentions are worthy of consideration in point of downright constitutional fairness.

We have not previously mentioned the familiar authorities which recognize that a compromise jury verdict is forbidden by the law. See *Hyde* v. *United States*, 225 U.S. 347,

* It is interesting that the Government's *only* argument in the Court of Appeals on the issue of compromise-verdict was the afterthought statutory argument above described; the Government made no attempt in the Court of Appeals to deny that, but for this asserted statutory meaning, the contention of compromise-verdict would be meritorious.

383, where this Court, while sustaining the particular verdict there involved, spoke condemnatorily of verdicts in which jurors have "bartered their convictions." See also *Maher* v. *Isthmian Steamship Company*, 253 F. 2d 414, 419 (C.A.2 1958), condemning like jury impropriety in the field of verdicts for civil damages. And see 53 Am. Jur. 714 (*Trial*, §1033):

> "A verdict which is reached only by the surrender of conscientious convictions as to a material issue by some members of the jury in return for a relinquishment by other members of their like settled opinion on another issue, the result not commanding the approval of the whole panel, is a compromise verdict. Such a verdict is improper and should be set aside as being founded on conduct subversive of the soundness of trial by jury. * * * "

2. We submit, furthermore, that the invalidating compromise character of the verdict in this case must be taken as having vitiated also the verdict under Count Two (mutilation of a taxpayer's document); our reasons for urging this additional vitiating effect of the compromise character of the verdict appear in our Statement of the Case, *supra*, where the altogether integral or intertwined character of Count Two with Counts Three and Four was shown.

3. In any event, and at the very least, the inconsistent character of the jury verdict herein under Counts Three and Four entitles us to ask this Court to examine the entire trial record closely for injustice. In *Manley* v. *United States*, 283 F. 2d 211, 222 (C.A.6, 1956), the Court said:

> "* * * when an obviously inconsistent verdict as to different Counts * * * is returned by the jury, both the Trial Court and the reviewing court should be

extraordinarily careful to scrutinize the record for the ascertainment of any prejudicial error."

The above quoted rule of the *Manley* case applies here *a fortiori* because the inconsistent verdicts in *Manley* were as between conspiracy and substantive counts, while in our case the inconsistency is head-on between counts all of which are substantive, and two of which (Counts Three and Four) involve literally exact identity of alleged offense and subject matter both in law and in fact.

Therefore, in keeping with the salutary principle laid down in the *Manley* case, *supra*, we respectfully urge this Court to "be extraordinarily careful to scrutinize the record for the ascertainment of any prejudicial error." We call attention to a number of such errors *infra*.

4. As regards the conviction under Count Two (mutilation of the Thompson affidavit), we have found only one case which even remotely resembles the facts of our case as regard enforcement of the statute involved, namely 18 U.S.C. 2071, quoted *supra*. It would seem that a prosecution for alleged mutilation or destruction of public records under this statute is a rarity indeed. The single case which may be comparable was decided in 1887, *United States* v. *De Groat*, 30 Fed. 764 (E.D. Mich., 1887), which involved a predecessor provision of the instant statute (R.S. 5403), where the Court directed a verdict of not guilty in a prosecution for purloining and destruction of Government records, the Court emphasizing that "the specific intent to destroy a record must be present", and that this intent had not been shown.*

* The defendants had stolen Internal Revenue records from a barn, selling four or five thousand pounds of these papers to junk dealers.

It was essential, then, in the instant prosecution, that the Government prove *prima facie* and beyond a reasonable doubt Giordano's specific intent to mutilate the Martha Thompson affidavit in the sense of wishing to spoil or destroy the text thereof at least in some manner or in some degree, not to say his accomplishment of some such purpose. In light of the several circumstances which we have have above enumerated, especially the continued textual intactness of the affidavit, how can it be said that the Government carried this burden of proof under Count Two? How can it be said that the Government even made out a *prima facie* case? Can there be criminal liability for "mutilation" of a paper where the case is one of *damnum absque injuria?*

In any event, the conviction under Count Two must fall if the conviction under Count Four is reversed. This is true not only by reason of our previous suggestion that the conviction under Court Two partakes integrally of the fatal compromise-verdict character of the conviction under Count Four, but also and distinctly for the following reasons: If the finding of Giordano's guilt under Count Four falls, then there is removed from the case the only ostensibly rational foundation for the requisite finding of the specific "willful" intent under 18 U.S.C. §2071, and there is likewise removed the entire foundation for the requisite finding of "unlawful" conduct and intent under the latter statute, inasmuch as petitioner Giordano could not be guilty of "willfully and unlawfully" mutilating the Martha Thompson affidavit if his tearing of that paper does not stand proven beyond a reasonable doubt as having been done by him in the setting of an effort by him to extort money from a taxpayer rather than, as Giordano claimed, as an action by an

honest law enforcement officer engaged in an effort to secure evidence against a taxpayer who was trying to bribe that officer.

Furthermore, the instructions to the Jury on Count Two (200a-201a) failed completely to give the Jury the necessary guidance for arriving at a just and lawful verdict on that Count, the instructions having been quite formalistic and indeed rather perfunctory. The defense had expressly requested the Court to charge that "where there is no intent to destroy a public record, there is no crime" (not printed, see stenographic minutes of the trial, p. 732). The Court had apparently contemplated accepting this request with the modification that "where there is no intent to destroy or to mutilate a public record, there is no crime" (not printed, stenographic minutes, p. 688), but it did not so charge (200a-201a).

5. Unfortunately, the defense took no exceptions to the Trial Court's instructions to the Jury (206a). We are obliged to request this Court to grant us the benefits of the "plain error" rule (the Court below evidently declined this same request).

The inadequacies in the charge to the Jury herein are to be found, in the main, exactly in those branches of the charge where one would most likely expect to find error when insufficient precision of language is employed in jury instructions, namely, in those elusive and rather abstract areas which deal with the concepts of the presumption of innocence and the rule of reasonable doubt. For the very reason that these concepts are somewhat elusive and abstract, and especially because they form so important a part of a charge to the Jury in a criminal case, special care is needed in their formulation.

The complete text of the Court's charge to the Jury in this case takes up only about fifteen printed pages (190a-205a), and the items above referred to all appear within a space of some three and one-half pages near the commencement of the charge (192a-195a). In these few pages the Trial Court committed the following errors which, we submit, made it impossible for the Jury to handle the case with any effective understanding of the rules of presumption of innocence and reasonable doubt:—Beginning in the first full paragraph on p. 192a and continuing through the first full paragraph on p. 193a, the Court gave the Jury a little essay on the meaning of the words "presumption" and "inference". In the course of this essay the Court imperceptibly, but with what must have been a badly confusing effect on the Jurors' minds, shaded over into a discussion of "direct" *versus* "circumstantial" evidence, and then shaded back again to the presumption-inference discussion. This in itself might not have been fatally confusing since circumstantial evidence does have to do with "inference" (although what in the world "presumption" has to do with the theory of either circumstantial or direct evidence escapes us). But in the second full paragraph on p. 193a the Court suddenly shifted from its generalized discussion of the theory of "presumptions" into a discussion of the crucial matter of the presumption of innocence. By thus thrusting upon the lay minds of the Jurors an abstract legal discussion of the quite irrelevant jurisprudential theory of "presumptions" in general as an immediate preliminary to the indispensable discussion of the presumption of innocence, the Court inevitably lessened the clarity and the impact of its remarks about presumption of inno-

cence—to which latter the Court devoted only a few lines in its charge and these, we must say, of an utterly perfunctory sort (193a).

Immediately after this the Court instructed on reasonable doubt, again very briefly (last two paragraphs on 193a, and first three paragraphs on 194a). The most remarkable feature of this very abbreviated charge on reasonable doubt is that virtually (and we mean that word literally) every sentence therein emphasizes the negative or pro-prosecution aspect of the rule of reasonable doubt; i.e., the charge on reasonable doubt is virtually from start to finish of its short extent a homily to the effect that the rule of reasonable doubt should not be too strictly applied against the interests of the prosecution. See 192a-193a.

If the Jurors went into their deliberations in this case with any remotely effective understanding of the rules of presumption of innocence and reasonable doubt, it was not the result of instructions which they received from the Trial Court.

Immediately following the above described charge on reasonable doubt the Court went back again to the irrelevant discussion of the meaning of direct and circumstantial evidence, and once more abstraction and formalism were visited upon the Jury's minds (see from the fourth paragraph on 194a through the second full paragraph on 195a).

Both the content and the checkered juxtapositioning of the above described instructions on "presumption", "inference", circumstantial evidence, presumption of innocence and reasonable doubt, plus their chokingly constricted brevity amounting to perfunctoriness, not only deprived these instructions of all effective meaning for the Jurors,

but must have positively handicapped them in their deliberations insofar as the defendant's chance for a fair trial at their hands was concerned.

We would respectfully recall to the Court the wise and just words which we quoted from the *Manley* case, *supra*, to the effect that when a Jury renders obviously inconsistent verdicts on different counts of an indictment both the trial and the reviewing courts should scrutinize the record with special care to discover prejudicial error. We ask this Court to apply the canon of the *Manley* case in reviewing the adequacy of the above described instructions to the Jury in this trial. And we ask the Court also to take into consideration the unhappy fact, which we venture to say is a matter of common knowledge among Bench and Bar, that there has been occurring in recent years a slow but sure degradation of the principles of presumption of innocence and reasonable doubt in many Federal criminal prosecutions. Cf. the well-known concurring opinion of the late Circuit Judge Jerome Frank in *United States* v. *Castro*, 228 F. 2d 807 (C.A. 2, 1956).

6. The defense objected to the introduction in evidence of the miniphone recording on the ground of its poor probative quality, and on the ground of violation of the defendant's privilege against self-incrimination (82a-83a, 85a-91a).

The indications of the poor electronic and acoustical qualities of the recording were quite striking. It was admitted that the wire on the spool had broken at least once with a loss of some nine inches upon its being retied by the Government's technicians. The spool again broke during

a demonstration playing for the Court and counsel during this very trial. The Internal Revenue detective who testined as the expert concerning this miniphone wire recording admitted that important conversation could have been lost by such breakages of the wire. Defense counsel stated repeatedly in open court, without contradiction from the Court or the prosecution, that the recording was a very faulty and poor one. See 80a-92a, 151a-156a, 209a-210a, 214a-215a.

When it is borne in mind that the defense pitched its entire case in regard to the evidentiary significance of the contents of the recording on the earnest and repeated contention that Giordano's and Lohse's statements on the recording were consistent with Giordano's having been engaged in an effort to perfect his evidence against Lohse as a taxpayer who was trying to bribe him, the presence in the recording of such serious imperfections as those above indicated made it incumbent upon the Trial Court to guard with utmost caution against the fatal injustice which must inevitably result to the defendant from a misleading wire "recording."

The Trial Court overruled the defense objections (we shall have more to say below concerning the objection which we made on constitutional grounds), the recording was allowed to be played to the Jury, the defendant was thereafter (needless to say) subjected to cross examination based on the recording, and, even worse, this latter cross examination was carried out by the Prosecutor with the aid of a purported stenographic transcript which he held in his hands and read from while thus questioning the defendant — all of this over the strenuous objections of the defense. See 80a-92a, 151a-169a.

Nor was this the end of the matter, for in his summation the Prosecutor again spread before the Jury supposed quotations from the miniphone recording, which quotations had actually been formulated with the aid of the purported stenographic transcript of that recording; defense objections and exceptions in this regard were without avail (184a-189a, 215a).

Furthermore, although the purported stenographic transcript of the miniphone recording was (quite rightly) not admitted in evidence, the severe prejudice which resulted from the Court's rather casual attitude about the importance of strictly enforcing its own exclusionary ruling in this respect—this casualness having been manifested by the Court's toleration as above noted of the Prosecutor's improper methods of cross examination and summation with the aid of the stenographic transcript—was instanced in an especially sharp and aggrieving way when it became known that the Jurors actually thought the stenographic transcript was in evidence as an exhibit, and they requested that it be sent into them during their deliberation; of course, it was not sent in to the Jury, but the Jury were told by the Court merely that the transcript was not in evidence and that if they wanted to they could hear the miniphone recording itself played back again, which the Jury soon thereafter requested should be done; and after that (which was 6 P.M.) the Jury apparently took time to have their dinner and were soon back (at 8:45 P.M.) with their verdict (208a-211a). These happenings were the basis for a defense motion for a new trial, in support of which it was additionally made known to the Court that the foreman of the Jury had been heard saying loudly from the Jury room in referring to "the

transcript" that "I know it is in evidence"; the motion was denied (214a-215a).

That the transcript was inadmissible under the "best evidence" rule requires no demonstration, the Trial Court itself having acknowledged such inadmissibility when it excluded the transcript from evidence as above noted. The prejudice which resulted from the transcript's being allowed to be treated in effect as though it were in evidence was, therefore, *ipso facto* fatal.

Returning to the question of the poor probative quality of the miniphone recording itself, we further urge as follows: The reception in "evidence" of this acoustically worthless or at least pervasively unreliable type of "recording," tendentiously "corroborated" by the wholly improper use of an "accurate stenographic transcript," affords a distinct and important ground for certiorari in this case. Would the courts of this country tolerate, in the proffering of any other form of evidence, for example, in documentary evidence, such physical imperfections, such pervasive lacunae, such fragmentation and shredding and all-around spoilage of the "text," such clumsy mutilation, such net undecipherability? Would our courts tolerate, in any documentary proof, or in any human witness' memory on the stand, this patchy, disintegrated sort of probativeness? What is there about electronic eavesdropping that should endow it, above all other modes of proof, with such unique immunity from the traditional rules of Anglo-American judicial proof? Electronic eavesdropping, because of its offensiveness to the civilized decencies of a free society, and not less because of its susceptibility to selective "spoilage" as is so dramatically instanced in this case—why is it that one never seems to get audible police recordings which

are *exculpatory* of a defendant—ought to be treated, under the tests of probativeness, as the lowest, not the highest quality of proof is treated.

As to the unconstitutionality (on Fourth and Fifth Amendment grounds) of the miniphone recording proofs, we urge that in the overall circumstances of this case—the attempted bribe-offer and semi-entrapment pattern in which Lohse engaged, doing so moreover in the final stages of the operation under the instruction and guidance of Internal Revenue detectives—that recording was obtained by illegal search and seizure and in violation of the petitioner's privilege against self incrimination, especially so within the meaning of the suggestion in *On Lee* v. *United States*, 343 U.S. 747 at 754, that eavesdrop evidence may be excludible where "an agent • • • violated any Federal law," the evidence herein having been obtained by a person (Lohse) who the defense alleged was attempting in this very same matter to bribe a Federal officer (Giordano) and who was acting merely as the pawn for the Internal Revenue detectives, the latter in turn being by that time chargeable with knowledge of the at least ambiguous endeavors of Lohse. In *Lopez* v. *United States*, 373 U.S. 427, involving a miniphone device worn by a Federal Agent, four of the Justices (including the Chief Justice) voted to expand plenarily the above mentioned suggestion in *On Lee* by overruling the primary ruling of the latter case, where the use of a similar device had been sustained.

The contentions above advanced in regard to the miniphone recording and the stenographic transcript are of course not foreclosed by the fact that petitioner Giordano on the stand admitted (151a-169a) the correctness of the

substance of most of the statements attributed to him by the miniphone recording (aided, improperly, by the purported stenographic transcript). Giordano was entitled to have the charges against him decided without recourse to the miniphone recording and the transcript, and he so urged in repeated and timely objections at this trial (80a-92a, 151a-156a, 209a-210a, 214a-215a). There was of course no "waiver" of these objections. Once the Trial Court had forced the miniphone recording into the picture, Giordano had no choice but to adapt the procedure of his defense accordingly, or, in the alternative, to surrender his right to take the stand in his own defense and testify forthrightly in response to all questions of the cross examiner.

CONCLUSION

It is respectfully submitted that this petition for certiorari should be granted.

Respectfully submitted,

JACOB P. LEFKOWITZ,
Attorney for Petitioner
Henry Giordano.

APPENDIX A

Judgment Sought to Be Reviewed
(No Opinion Rendered)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the fourteenth day of May one thousand nine hundred and sixty-four.

Present:

HON. IRVING R. KAUFMAN,
HON. PAUL R. HAYS,
HON. THURGOOD MARSHALL,
Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

HENRY GIORDANO,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

Appendix A—Judgment Sought to Be Reviewed
(No Opinion Rendered)

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A true copy,

A. David Fusaro
Clerk

[Seal]

APPENDIX B

Point II of Government's Brief in Court of Appeals

"POINT II

The guilt of appellant under Count Two was established beyond a reasonable doubt. Appellant possessed as established by the evidence and found by the jury, the requisite criminal intent to destroy or mutilate a public document in violation of 18 U.S.C. Section 2071.

Appellant contends not only that he did not have the required criminal intent to violate Title 18 U.S.C. Section 2071, but that the Government failed to prove that intent.

Intent in a criminal case can rarely be established directly since it involves an individual's state of mind, but it can be proved circumstantially. However, contrary to appellant's view of the facts, both types of evidence were present in this case.

Captain Lohse testified that appellant while in the car, stated to him: "I am getting very, very uneasy. Let's destroy these papers, Captain." These papers included Mrs. Thompson's affidavit from which appellant tore off his name. (A. 41a.) Appellant admitted that he intended to destroy the documents and he admitted asking Captain Lohse to destroy Mrs. Thompson's copy of the affidavit. (A. 167a., 168a.) These admissions at the very least eliminate any claim of appellant that he had no intent to mutilate the affidavit. The jury by its verdict found that appellant had the requisite intent.

The mere fact that appellant knew that Mrs. Thompson possessed a copy of the affidavit did not change his criminal intent to innocence as he claims. Appellant mutilated what was available to him, the original affidavit. He

could only hope that Captain Lohse and Mrs. Thompson would destroy their copy as he requested, or at least keep quiet about it. Appellant admitted he asked them to destroy the affidavit. He admitted he removed his name from the original affidavit by tearing the paper. The fact that at his trial he offered into evidence the affidavit along with the torn piece taped back on, did not indicate innocence of any wrongdoing. At least, it was for the jury to make that inference. The jury declined to do so as evidenced by its verdict.

What is indicated by the offer of the affidavit into evidence at the trial by appellant was a plan of defense strategy calculated to meet the overwhelming evidence of guilt. Appellant upon the facts in this case could not very well deny the evidence of the affidavit and his signature thereon in view of the testimony of Mrs. Thompson and Captain Lohse, corroborated by the taped recording.

There is no support in the record for the argument made by appellant on his brief at pages 23-24. The Court's charge on Count Two was proper. Appellant took no exception to this portion of the Court's charge. While the Court did not follow the requested charge verbatim the substance of the charge was fundamentally the same as the request which the Court accepted from the appellant. (R. 688-689, 732; G. 2a, 3a; A. 200a-201a.)

The question of Giordano's mutilation of the affidavit and his intent in so doing were jury determinations. The jury's verdict, amply supported by the evidence, found that appellant had the requisite intent and was guilty of the crime charged under Count Two."

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	1
Statutes involved	2
Statement	3
Argument	7
Conclusion	9

CITATIONS

Cases:

Dunn v. *United States*, 284 U.S. 390 7

Lopez v. *United States*, 373 U.S. 427 8

United States v. *Dotterwich*, 320 U.S. 277 7

Statutes:

Internal Revenue Code, Section 7214, 26 U.S.C. 7214 ..... 3, 4

18 U.S.C. 2071 ..... 2, 4, 7

738-007—64

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 180

HENRY GIORDANO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The order of the court of appeals (Pet. App. A) affirming the conviction without opinion is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 14, 1964. The petition for a writ of certiorari was filed on June 12, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the jury could properly find petitioner guilty of attempting to collect a bribe to settle an alleged violation of revenue laws, and acquit him of

demanding an unauthorized payment to perform his duty.

2. Whether the evidence of criminal intent was sufficient to sustain petitioner's conviction for mutilating an Internal Revenue Service document.

3. Whether a miniphone recording of a conversation between petitioner and a witness was properly admitted into evidence to corroborate the witness' testimony.

4. Whether petitioner was prejudiced because government counsel, in cross-examination and summation, used a transcription of the miniphone recording.

STATUTES INVOLVED

18 U.S.C. 2071 reads:

> (a) Whoever willfully and unlawfully conceals, removes, mutilates, obliterates, or destroys, or attempts to do so, or, with intent to do so takes and carries away any record, proceeding, map, book, paper, document, or other thing, filed or deposited with any clerk or officer of any court of the United States, or in any public office, or with any judicial or public officer of the United States, shall be fined not more than $2,000 or imprisoned not more than three years, or both.
>
> (b) Whoever, having the custody of any such record, proceeding, map, book, document, paper, or other thing, willfully and unlawfully conceals, removes, mutilates, obliterates, falsifies, or destroys the same, shall be fined not more than $2,000 or imprisoned not more than three years, or both; and shall forfeit his office

and be disqualified from holding any office under the United States.

Section 7214 of the Internal Revenue Code of 1954 (26 U.S.C. 7214) provides in pertinent part:

> (a) *Unlawful acts of revenue officers or agents.*—Any officer or employee of the United States acting in connection with any revenue law of the United States—
>
> * * * * *
>
> (2) who knowingly demands other or greater sums than are authorized by law, or receives any fee, compensation, or reward, except as by law prescribed, for the performance of any duty; or
>
> * * * * *
>
> (9) who demands, or accepts, or attempts to collect, directly or indirectly as payment or gift, or otherwise, any sum of money or other thing of value for the compromise, adjustment, or settlement of any charge or complaint for any violation or alleged violation of law, except as expressly authorized by law so to do;
>
> shall be dismissed from office or discharged from employment and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both. * * *

STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, petitioner, an officer of the Internal Revenue Service, was convicted on counts which charged that he unlawfully mutilated an affidavit deposited by one Martha

Thompson with the revenue service (18 U.S.C. 2071) and that he attempted to collect a bribe of $6,000 from one Marion W. Lohse for the adjustment of an alleged violation of the revenue laws (26 U.S.C. 7214(a)(9)) (R. I. 5–7). Petitioner was acquitted on a count which charged that he demanded the sum of $6,000 from Lohse in violation of 26 U.S.C. 7214 (a)(2) (R. I. 6). Petitioner was sentenced to imprisonment of 18 months on each count, the terms to run concurrently (R. I. 1–3). The court of appeals affirmed without opinion (Pet. App. A).

1. The government's evidence may be summarized as follows: Martha Thompson, a married woman with children who was separated from her husband, had known Marion Lohse, a sea captain, for 32 years (R. I. 8–9). Captain Lohse lived with Mrs. Thompson since 1942 and was the sole support of Mrs. Thompson and her family (R. I. 9, 12, 31).

In March 1962, Mrs. Thompson received a letter from the Internal Revenue Service, signed by petitioner, informing her that the Service had no record of her having filed an income tax return for 1960 and advising her to report to the Service office (R. I. 10). Mrs. Thompson called petitioner to explain that she was not employed. In the course of the conversation she volunteered that she had signed joint returns filed by Captain Lohse, who was then out of the country (R. I. 12). Petitioner instructed Mrs. Thompson to report to his office (R. I. 13).

On April 5, 1962, when Mrs. Thompson reported to petitioner's office, he questioned her extensively

about her assets, including the value of any bonds, insurance, real estate, and other property (R.I. 14, 15). He then asked her if she could withdraw $5,000 from the bank and told her he would meet her in the bank in an hour (R.I. 17–18). When Mrs. Thompson said she did not understand what he was asking, petitioner told her to think it over during the weekend and to call him on Monday (R.I. 18).

Mrs. Thompson called petitioner at the designated time and told him that she would not have wilfully withheld payment of any money due the government and was willing to pay it now (R.I. 18). Petitioner then insisted that she come to his office and sign a statement. On April 12 she signed a statement incorporating the information which she had given petitioner as to her marital status and assets and the fact that she had filed joint returns with Captain Lohse (R.I. 19–22). Petitioner witnessed the signing of this affidavit, kept the original and gave her a copy (R.I. 22–23).

In May 1962, Captain Lohse was informed by Mrs. Thompson that his tax returns were being investigated and that he had been requested to communicate with petitioner (R.I. 32). Lohse thereupon made an appointment with petitioner for July 31 (R.I. 33).

When Lohse reported to petitioner's office, petitioner drew from him the admission that he had instructed Mrs. Thompson to sign the joint returns (R.I. 33). Petitioner then instructed Lohse to return the following morning and said, "this is a serious situation but I want to help you" (R.I. 34).

On the following morning petitioner told Lohse that he owed $54,000 in income tax, $8,000 in interest, and a 100 percent penalty for filing fraudulent returns (R.I. 34). He requested Lohse to meet him in the street, where he told Lohse that he would settle the matter if Lohse would pay him $10,000. Lohse replied that he would think it over, and petitioner said, "Well, Captain, many times it is better to make a quick decision than to think things over too long" (R.I. 35).

Lohse went to his bank and withdrew $10,000, but decided to see his attorney before proceeding further. His attorney referred the matter to the Internal Revenue Service (R.I. 36–37).

On August 16, 1962, Internal Revenue inspectors attached a miniphone recording device to the person of Captain Lohse (R.I. 37). The captain met petitioner at a restaurant, as previously arranged, and petitioner suggested that they go to his car (R.I. 39). In the car, with petitioner driving, the two men discussed the payment of the money to petitioner. Lohse said that he had brought $5,000. Petitioner asked for $6,000, saying that he had someone else to consider (R.I. 40).

At one point during the meeting, petitioner, becoming apprehensive that he was being followed, took from Lohse the original copy of the affidavit which Mrs. Thompson had signed and which petitioner had notarized. Petitioner tore the left hand corner of the affidavit which bore his signature, returned the affidavit to Lohse, and then took it back again (R.I. 41). Shortly before his arrest, when he saw he was

being followed, petitioner accused Lohse of attempting to bribe him and attempted to discover if Lohse had a recording device on his person (R.I. 42).

2. After Captain Lohse had testified, the court permitted the miniphone recording to be played to the jury (R.I. 92) over petitioner's objection that the recording was not accurate (R.I. 82–83) and that its use compelled petitioner to give evidence against himself (R.I. 90).

3. Petitioner's defense was that Lohse was attempting to bribe him (R.I. 132, 135, 139). He admitted that he did not report the alleged bribe attempt (R.I. 132, 134), and that he tore the affidavit, but claimed that he had torn the document merely to test Lohse's reaction (R.I. 142).

ARGUMENT

1. There is no merit to petitioner's contention that the verdict of the jury in acquitting him of demanding money for performance of his duty and finding him guilty of attempting to collect a bribe is inconsistent. The short answer is, of course, that consistency is not required in a jury verdict. *Dunn* v. *United States*, 284 U.S. 390, 393; *United States* v. *Dotterweich*, 320 U.S. 277, 279. In any event, there was no inconsistency in this case. On the basis of the record the jury could properly conclude that petitioner was exacting a bribe to compromise a liability rather than an extra fee to perform his duty.

2. The evidence was clearly sufficient to support the finding that petitioner was guilty of unlawfully mutilating a public document within the meaning of 18 U.S.C. 2071. Petitioner admittedly tore his name

from the document, and the jury could infer intent from the fact that the affidavit of Mrs. Thompson, which contained information incriminating Captain Lohse, was being carried, together with other Service documents pertaining to Lohse, in petitioner's car at a time when he was attempting to collect a bribe and that it was mutilated when petitioner feared discovery. Moreover, petitioner admitted that he also asked Captain Lohse to destroy Mrs. Thompson's copy (R.I. 168).

3. The introduction into evidence of a miniphone recording did not violate petitioner's constitutional rights against illegal search and seizure. The recording was made by Captain Lohse, who testified as to the details of the conversation. Lohse was in petitioner's car at petitioner's invitation. The miniphone recording was proper evidence to corroborate Lohse's testimony. *Lopez* v. *United States*, 373 U.S. 427, 437–440, 442. There was also expert testimony that the quality of the recording was good (R.I. 92).

4. Petitioner objected at trial to the government's use of a written transcript of the recording in cross-examination and in closing argument. This transcript was not introduced into evidence but was prepared for the convenience of both counsel. The use to which it was put by government counsel could not have prejudiced petitioner. During the government's summation, the court instructed the jury to use its own recollection of the recording and not the statement of government counsel as to what it contained (R.I. 185, 188–189).

5. Petitioner's contention that the court's instructions as to the presumption of innocence and reasonable doubt were erroneous must be rejected because he took no exceptions to the instructions (R.I. 206). In any event, the charge was a clear, fair and accurate statement of the applicable legal principles.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

HERBERT J. MILLER, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
JULIA P. COOPER,
Attorneys.

JULY 1964.

U.S. GOVERNMENT PRINTING OFFICE: 1964